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IN THE SUPERIOR COURT OF THE STATE OF ARIZONA
IN AND FOR THE COUNTY OF YAVAPAI

STATE OF ARIZONA, Plaintiff, vs. STEVEN CARROLL DEMOCKER, Defendant.	No. P1300CR20081339 Div. 6 **OBJECTIONS TO THE STATE'S LATE DISCLOSED, IRRELEVANT HARTFORD DOCUMENTS AND WITNESSES**

Steven DeMocker, by and through counsel, hereby objects to the State's desperate and outrageous attempt to further derail and delay this trial by its late disclosure of irrelevant documents and witnesses and its false, misleading and defamatory accusations made against Mr. DeMocker, his family, the victims in this case, and Mr. DeMocker's counsel. This objection is based on the due process clause,

the Eighth Amendment and Arizona counterparts, Arizona Rules of Evidence, Arizona Rules of Criminal Procedure and the following Memorandum of Points and Authorities.

MEMORANDUM OF POINTS AND AUTHORITIES

This trial was set in May of 2009 for May of 2010. The State thereafter engaged in a pattern of continual and flagrant disclosure violations that ultimately led the Court to strike two death penalty aggravators, preclude certain evidence and ask for briefing related to other appropriate sanctions for the State's misconduct. During pretrial litigation, the State engaged in a series of increasingly desperate attempts to delay the trial. The State filed a baseless special action seeking to overturn the Court's decision with respect to dismissal of two death penalty aggravators. This was unsuccessful. The State also sought to remove the trial judge for alleged bias and prejudice on the eve of that pretrial ruling. This was also unsuccessful.

Trial commenced with jury selection on May 4, 2010. The State, after weeks of jury selection and eighteen months after filing a notice seeking the death penalty, dismissed the death penalty notice without any meaningful explanation on May 26 after a pool of 40 jurors had been death qualified. Opening statements took place on June 3, 2010.

On June 17, Judge Lindberg suddenly fell ill. The State, while publically avowing that it wanted the trial to go forward and would cooperate in the process, rejected no fewer than 13 of 18 proposed replacement judges and failed to propose even a single judge to proceed with the trial. When a replacement judge was finally identified, the Court indicated its intent to proceed with trial perhaps during the week of July 12, 2010. For the first time, and after 7 days of presenting its case-in-chief, the State inexplicably demanded an additional 25 days to complete its case, thus creating a trial that would last two months longer than jurors and the Court were originally

advised. The jurors were individually interviewed by the Court and the parties on July 7 and remarkably indicated an ability and willingness to proceed.

The Court set a hearing for July 9 to address certain late disclosure issues and the release conditions of Mr. DeMocker. During that hearing, for the first time, the State indicated that it intended to call Mr. DeMocker's counsel, John Sears, to testify about a "newly discovered" issue. Also on that date, on information and belief, Yavapai County Attorney Sheila Polk contacted Dean Trebesch, the Yavapai County Indigent Defense Contract Administrator to inquire about the subject matter of *ex parte* and under seal documents relating to the payment of Mr. DeMocker's defense costs. Although she was properly not provided with this information, she did attend Court proceedings on July 9 but did not enter an appearance. Also, during the course of the trial, the State made the unfounded, improper and totally irrelevant suggestion in a public pleading that defense counsel were being paid by Yavapai County taxpayers. (See State's Response to Defense Supplemental Request Regarding Sanctions, filed June 21, 2010).

While the Court is busy attempting to familiarize itself with the record of two years of pretrial litigation and seven days of trial transcripts, the State has engaged in an increasingly desperate attempt to distract the Court and publically smear Mr. DeMocker, his family, the victims in this case, and Mr. DeMocker's counsel. The State has made false accusations and false statements. It has deliberately relied on and placed in the public domain previously precluded documents and statements. It has also placed in the public domain information the State knows to be unreliable and previously precluded by the Court based on its unreliability. The State's misconduct has resulted in press accounts about irrelevant and prejudicial matters designed to infect this small community in the middle of trial. Counsel will not speculate on the reasons for the State's further and continued misconduct, other than to wonder out loud at the obvious

questions raised about the State's attempt to create a mistrial and thereby further delay these proceedings.

I. The Late Disclosed Hartford Insurance Information and Witnesses Should be Precluded Based on the State's Rule 15.6 Violations.

Leaving aside the State's obvious failure to exercise the due diligence required by Rule 15.6 to inquire about the status of insurance payments by Hartford prior to trial, by its own admission the State was aware of the possible forthcoming disclosure relating to Hartford Insurance payouts as of July 3, 2010. Yet, the State did not comply with its obligations under Arizona Rule of Criminal Procedure 15.6(b). Pursuant to Arizona Rule of Criminal Procedure 15.6(b), if a party determines that additional disclosure may be forthcoming within thirty (30) days of trial, it is to notify the court and other parties "immediately" of the circumstances and when the disclosure will be available. The State ignored this Rule and filed its "Notice" on the same day it late disclosed these documents to the defense, on July 1. The State waited almost a month from the time when it now alleges it knew that disclosure would be forthcoming to file the requisite notice under Rule 15.6(b). These materials should be precluded on this basis alone.

The State should also be precluded from using the Hartford Insurance information because it failed to exercise due diligence in investigating the Hartford Insurance payout. Section (d) of Rule 15.6 provides that if a party seeks to use material that was not disclosed seven (7) days prior to trial, the party must file a motion and affidavit seeking leave of court to use the material or information. In considering whether to grant the motion, the Court is to consider whether "the material or information could not have been discovered or disclosed earlier even with due diligence and the material or information was disclosed immediately upon its discovery."

1. The Late Disclosure

On July 1, 2010 the State late disclosed over 500 pages of documents, 6 CDs of material and 11 late disclosed witnesses. Mr. Sears was disclosed as a witness as to the "voice in the vent" incident. On July 7, after 5:00 p.m., the State filed a motion pursuant to 15.6(d) seeking leave to use this material at trial. The State also filed a "Third Addendum to List of Witnesses for Case in Chief" and identified two witnesses, Robert Schmitt and Dan Wilson, described as civil attorneys facilitating the settlement of the Hartford Life Insurance proceeds involving the death of Carol Kennedy. On July 8, after 7:00 p.m., the State delivered over 400 pages of bank records. That same date, the State also filed a "Supplement" to its motion to extend time. At the hearing on July 9 the State, for the first time, indicated that it intended to call John Sears, Mr. DeMocker's counsel, as a witness relating to the Hartford Insurance payout.

2. The State's Lack of Due Diligence

The State has known about the Hartford Life Insurance policies since July 2008. In November 2008, the State disclosed to the defense a September 2008 email from Mr. DeMocker to Hartford that indicated he was seeking to disclaim his benefits to his daughters or gift the money to them. Thus, the State has been aware since November 2008, that Mr. DeMocker was seeking to have the Hartford Insurance policy benefits provided to his daughters.

In February 2009, YCSO Detective Doug Brown contacted Hartford and asked about policy provisions relating to suicide. (Bates 6714.) There is no mention in his supplemental report that he inquired about whether any of the policies had been paid out. Likewise, in April 2010, YSCO Lt. Tom Boelts spoke with Hartford. His report also makes no mention of any question or response regarding the payout of Hartford policy benefits. Instead, Boelts asked whether Mr. DeMocker made a call about disclaiming benefits prior to making a claim for death benefits. While the State's

Motion to Extend Time for Additional Disclosure filed on July 7 indicates that "[t]he State had repeatedly asked Hartford Life Insurance if the death benefits had been paid and Hartford Life Insurance stated repeatedly that the death benefits of Carol Kennedy had not been paid" (State's Motion to Extend time, page 2), this assertion is not born out by the records disclosed to the defense.[1] In fact, in both 2009 and 2010, the State had contact with Hartford and, according to its own reports, simply did not ask about whether or not benefits had been paid. It appears from disclosure that the last time the State even inquired about this issue from Hartford was in 2008.

The State has not exercised the required due diligence in inquiring about the Hartford Life Insurance policies being paid. From the State's own disclosure it is obvious that Hartford always responded promptly to requests for information or records from the State. The State now attempts to blame its own failure to exercise due diligence on Hartford. The records disclosed by the State show otherwise. Against this backdrop, it is impossible for the Court to find that the material or information could not have been discovered or disclosed earlier even with due diligence. It is clear that this information could have been discovered earlier and disclosed with any exercise diligence or any attempt by the State to inquire of Hartford. The State should be precluded from introducing this evidence based on its failure to exercise the required due diligence under Rule 15.6.

II. The Late Disclosed Hartford Information and Witnesses Should be Precluded under Arizona Rules of Evidence 401, 402 and 403.

[1] Counsel believe that either Hartford and/or the Yavapai County Sheriff's Office are likely to have recordings of this and any other telephone calls between Hartford and the YCSO. In the event the Court sets an evidentiary hearing on these matters, recordings of any and all such calls should be disclosed to determine whether the State did in fact ask and was in fact provided with false information from Hartford relating to the payout of these policies, contrary to the police reports provided to date to the defense.

Arizona Rule of Evidence 401 defines relevant evidence. "Relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. Rule 402 provides that "[e]vidence which is not relevant is not admissible." Arizona Rule of Evidence 403 provides that relevant evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by consideration of undue delay, waste of time, or needless presentation of cumulative evidence. The late disclosed information about the payment of Hartford Life Insurance policies and witnesses should be precluded based on Rule 403.

The late disclosed Hartford Life insurance information and witnesses are not relevant. The allegations by the State that Mr. DeMocker's attorneys' fees were paid out of the life insurance proceeds have no tendency to make it more or less probable that Mr. DeMocker killed Carol Kennedy. The Hartford Life insurance information should be precluded on the basis of Rules 401 and 402.

The State has argued that the late disclosed Hartford Life Insurance allegations are relevant to motive. It alleges that the "jury has an absolute right to know" that Steve DeMocker "ultimately received the life insurance proceeds from the death of Carol Kennedy"; that he persuaded his daughter and fiancée "to violate the terms of the Testamentary Trust of Carol Kennedy and pay those proceeds to his attorneys"; and that he "deceived the Hartford Insurance Company out of the $750,000 dollars and then manipulated the funds for his benefit." Ignoring for a moment that these allegations are not true, this information is in no way relevant to the question of who killed Carol Kennedy.

The State has previously engaged in a pattern of trying to smear Mr. DeMocker and his counsel, and the Court has properly shut the State's prior attempts down.[2] This Court should quickly do likewise. Even if they were true (which they are not), allegations about who was paid by Hartford, what was done with the insurance money, and how and what Mr. DeMocker's counsel were paid have no probative value to the jury issues in this case. The potential for prejudice and confusion of the issues is very high. The questions involve probate laws, the administration and amendment of an estate and a testamentary trust, confidential and attorney client information of Mr. DeMocker, Katie DeMocker as a Trustee and Personal Representative, and other complex and confusing issues. The list of witnesses, exhibits and time required to even begin to address these issues is almost endless.[3] Many of these witnesses may also need to be advised of their right to counsel, based on the State's wild and utterly unfounded accusations against them. Any limited or nonexistent probative value is substantially outweighed by the confusion, distraction and potential for prejudice occasioned by these false allegations.

The State has also argued that Mr. Sears is a relevant witness because he notarized a document wherein Mr. DeMocker disclaimed his interest in the Hartford Life Insurance policies. This argument is laughable on its face. It is yet another attempt by the State to disqualify Mr. DeMocker's counsel after two years of representation, three months into the trial. Judge Lindberg immediately shut the State down when it previously attempted to make Mr. Sears a witness related to state of mind, reminding the State that it is simply not relevant.[4] The Court will see that the State's motion in limine attempting to

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[2] See e.g. January 13, 2010 Transcript (Under Seal); January 15, 2010 ME; March 30, 2010 hearing Transcript (Under Seal).

[3] Counsel believe that at least the following witnesses may need to testify: Hartford Life Insurance representatives (Dettman and maybe others), Chris Kottke, Jan DeMocker, Jim DeMocker, Charlotte DeMocker, Katie DeMocker, Renee Girard, John Sears, Larry Hammond, Lt. Tom Boelts, Det. Doug Brown, Bob Schmitt and Dan Wilson.

[4] See January 13, 2010 Transcript (Under Seal).

preclude mention of the anonymous email was denied on June 3, with no suggestion that Mr. Sears was somehow a necessary witness made at that time. No new facts have arisen since that time that would in any way justify their claim today that Mr. Sears is now somehow a witness. This is a smokescreen, and an obvious attempt to both delay the trial and to interfere with mr. DeMocker's Sixth Amendment right to counsel.

It is also important for the Court to know that the State has cited the Court to information it knows to be unreliable in support of its argument that this information is somehow insidious and incriminating. The State knows that the "cookie" date on the computer search "payment of life insurance benefits in the case of homicide" is meaningless. It knows that its own experts cannot say that a search was performed on any particular date or even viewed on any particular date. The State knows this information was precluded by the Court on May 11, 2010. The Court found that given the lack of information the State has, there is no foundation that would permit the introduction of this computer search. See transcript from May 11, 2010 hearing. In fact, when the State earlier asked for reconsideration of the computer searches rulings by the Court, it did not seek reconsideration of this search because it is aware that its own experts say there is no date associated with when this search was viewed or performed. Yet, in a blatant disregard of this Court's prior rulings and the facts relating to the computer searches, the State inserts into a public document what it knows to be unreliable information as support for its theory that the insurance payout is somehow relevant. It does this in both its Supplement and again in Exhibit A as an attachment to its Supplement. Likewise, the State's Exhibit A refers to telephone calls that it knows were precluded by this Court's prior orders. While the calls are not identified with enough particularity to determine their prior status in Exhibit A, the State provided the defense with a CD and a list of jail calls on July 9, 2010 in court. Of the 11 calls identified, all but two have been excluded by prior order of the Court. The State's

repeated attempts to rely on precluded, unreliable information should be sanctioned by the Court.

In an apparent attempt to circumvent the obvious irrelevance of these issues, the State has asserted that Mr. Sears opening somehow "opened the door" to the Hartford insurance information. Mr. Sears' brief mention of this issue was a response to the partial story told to the jury in the State's opening. There was no "opening the door" by the defense opening statement. In Mr. Butner's opening statement he told the jury that Mr. DeMocker was the beneficiary of two life insurance policies on Carol Kennedy and that he "made a claim for those benefits on August 20 of the year 2008." (See transcript of June 3, 2010, a.m. session, page 62). Mr. Sears' opening explained in response that Mr. DeMocker "disclaimed, he signed over any interest to the girls, and the money was paid out to the girls." (See transcript June 3, 2010, p.m. page 42). It is obvious that this response to the State's argument does not make the allegations about the subsequent payment of Mr. DeMocker's legal fees in any way relevant, nor did Mr. Sears open the door by responding to the State's partial story to the jury in its opening.

III. The Late Disclosed Hartford Life Insurance Information and Witnesses Should be Precluded based on Arizona Rule of Evidence 404(b).

Arizona Rule of Evidence 404(b) provides that evidence of other prior wrongs or acts is not admissible to prove character to show action in conformity therewith. The State has not disclosed any prior bad act under Arizona Rule of Criminal Procedure 15.1(b)7 or made any procedural request as required pursuant to 404(b). However, in the "Supplemental" pleading filed July 8, the State makes clear that is alleging prior bad acts in terms of the Hartford Life Insurance Policies. The State now, during trial, alleges the following prior bad acts:

1) Mr. DeMocker persuaded his daughter and fiancée "to violate the terms of the Testamentary Trust of Carol Kennedy and pay those proceeds to his attorneys" and

2) Mr. DeMocker "deceived the Hartford Insurance Company out of the $750,000 dollars and then manipulated the funds for his benefit."

In order to admit prior bad act evidence the State is required to provide notice of the acts in compliance with Rule 15.1(b)(7). Then the court must find by clear and convincing evidence that the acts occurred and were committed by the person alleged to have done so. If the Court so finds, the act is not admissible to prove the character of a person or to show action in conformity therewith. Rather, it is only admissible if offered as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. The court must also consider the probative value against the prejudicial effect of such evidence pursuant to Rule 403.

The State should be prohibited from admitting the Hartford Life Insurance information as prior bad act evidence because: 1) it has not provided proper notice of bad acts; 2) it is offering the acts for the improper purpose of proving character; and 4) the State cannot make the required clear and convincing showing for these acts. Finally this evidence should be precluded pursuant to Rule 403 based on the danger of unfair prejudice and the minimal probative value.

The State's purported purpose in offering this evidence – motive – makes no sense. How does the alleged use of insurance proceeds to pay Mr. DeMocker's counsel have anything to do with his alleged motive to kill Carol Kennedy? The State has yet to explain how this might be so and a simple review of the allegations makes clear that this is nonsense. The State alleges that Mr. DeMocker killed Carol Kennedy for pecuniary gain – that is to avoid paying her alimony and to reap the benefits of her life insurance

policies. The payout of her life insurance policies to her daughters, their subsequent gift of this money to their grandparents, and the family decision to use this money to support their wrongfully accused father/son has no relevance to any allegation of Mr. DeMocker's motive to kill Carol Kennedy. Instead, the State is attempting to twist and manipulate the facts and this act of belief in their father's innocence to some "manipulation" on the part of Mr. DeMocker. For this, there is no evidence, only innuendo and unfounded accusation on the part of the State.

It is clear from the State's pleading and statements in Court on July 9 that this evidence is offered for purposes of proving Mr. DeMocker's character and not for any permitted purpose under Rule 404(b). Under Rule 404(b), acts are not admissible to prove the character of Mr. DeMocker. Evidence of bad acts is inadmissible to prove character by the plain language of the Rule, "evidence of other crimes, wrongs, or acts in not admissible to prove the character of a person in order to show action in conformity therewith." See Rule 404(b).

The Rule 403 balancing test "is important in analyzing any Rule 404 (b) evidentiary question." *State v. Moreno,* 153 Ariz. 67, 69, 734 P.2d 609, 611 (Ct.App.1986), *cert. denied,* 484 U.S. 890, 108 S.Ct. 213, 98 L.Ed.2d 177 (1987).

> [B]ecause of the risk of improper use, the trial judge has a special obligation to insure that [the] probative value of the evidence for the purpose offered is sufficiently great in the context of the case to warrant running that risk. The discretion of the trial judge under Rule 403 to exclude otherwise relevant evidence because of the risk of prejudice should find its most frequent application in this area.
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> Udall & Livermore, *supra* note 3, at § 84, pp. 179-80 (footnote omitted).

The above evidence should also be excluded under Rule 403. The probative value of the evidence is minimal. The potential for confusion and prejudice is clear. See argument II *supra.*

IV. The State's Allegations Regarding Hartford Insurance Policies Are False.

The real truth behind what took place with respect to the payment of Hartford Life Insurance policies to Katie and Charlotte DeMocker is that Steve DeMocker's daughters, victims in this case, believe so fully in his innocence that they did what they could to support his defense, including providing their inheritance to the family to determine how it should best be used. Instead of seeing this act for what it is, the State takes liberty with the facts, blames others for its malfeasance, and makes accusations it cannot substantiate in an attempt to deny Mr. DeMocker counsel, delay and derail the trial in an underhanded way, and dirty up Mr. DeMocker, his family, victims of this offense and Mr. DeMocker's counsel. The Court should prohibit this, proceed with the trial and sanction the State accordingly.

To begin, Steve DeMocker was precluded by operation of law from receiving the insurance proceeds by reason of his divorce from Carol Kennedy, the named insured. *See* A.R.S. §14-2408; see also *In the Matter of the Estate of Dobert*, 192 Ariz. 248, 963 P.2d 327 (App. 1998). That being the case, his written disclaimers were not necessary, but were provided as a "belt and suspenders" accommodation to Hartford. The proceeds were, then, inevitably going to be paid for the benefit of his daughters, Katie and Charlotte. In other words, had Mr. DeMocker actually done what the State has now alleged, he would still not have been paid the money by Hartford.

Likewise, the handling of the Carol Kennedy estate was done in strict observation of the law, through independent counsel (Chris Kottke) and with the supervision and approval of Judge Mackey at every step. The insurance polices were not listed as an asset of the estate because they were owned by Mr. DeMocker, not the decedent, a fact easily discerned from the documents the State has now breathlessly disclosed. When the proceeds of one policy briefly landed in the estate account before being transferred to the testamentary trust, all of the lawful creditors of the estate had

already been paid every penny of their claims, and all taxes, fees and costs of administration had been paid in full. At that point then, there was no need to re-open the probate to reflect the fact that the money went from Hartford to the estate and then immediately into the testamentary trust. The trust was modified, with the consent of the trustee and the beneficiaries, to pay out the funds to the girls, whose mother had just been murdered and whose father was in jail falsely accused of that horrible crime.

Thereafter, Katie withdrew her half of the funds, and Renee Girard, with whom Charlotte was living at the time subject to a custodial power of attorney from Steven DeMocker who was still in jail, agreed to step in to act as trustee until Charlotte turned eighteen in October, 2009, at which time the remaining half of the proceeds were distributed to her. Katie resigned as trustee because she was very busy with her last year of college and two jobs, trying to finish her education and help support herself. At all times, both girls acted with the support and loving help from their family, and the legal advice of their lawyer. What decisions they made with respect to the use of the money they received were theirs, and theirs alone. Any suggestion to the contrary is an insult to these young ladies, who are victims of this crime in the most direct and awful way imaginable. If they used their money to help defend their father, it was because they believe him to be absolutely innocent. Further inquiry into their motives and decisions is an unjustified and unwarranted trampling of their rights as crime victims and as human beings. The State should be ashamed of the way they have treated these poor girls, once again.

CONCLUSION

The State is attempting to supplant evidence with reckless and outrageous character assassination, not just of the defendant, but of his counsel, and worst of all, two of the victims. The proposed testimony is not relevant and is offered for no purpose

other than to distract the jurors from the lack of physical evidence in the case. The prosecutor's latter-day desperation in all of this, we guess, should be reassuring. If this is all they have, and if this is the depth to which they now will dip, maybe we should be somehow relieved. We are not. The Court should not be either. The State is attempting to turn this trial into a long-running, dirty war—a war in which the State feels totally free to ignore the rulings of the Court and the rules of criminal procedure. Defendant Steven DeMocker, by and through counsel, hereby requests that this Court prohibit the State from offering information or witnesses related to the late disclosed Hartford Insurance policies, and to preclude them from calling John Sears as a witness.[5] We beg the Court to stop this continuing and blatant endeavor. The State may have no evidence that Steve DeMocker killed Carol Kennedy, but they will, if allowed, try to show him to be just the kind of man who could commit a crime like this on this latest theory of unsupported accusations and irrelevant issues about how his counsel was paid. Rules 15.6, 403 and 404 are designed to preclude this tawdry attempt.

DATED this 12th day of July, 2010.

By: _____

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[5] At all times, Mr. Sears was simply acting as Mr. DeMocker's lawyer. He has no additional evidence to offer beyond what the State already knows as to these matters. Listing him as a witness is merely another attempt to disqualify him, delay this trial, and to interfere with his representation of Mr. DeMocker.

ORIGINAL of the foregoing hand delivered for filing this 12th day of July, 2010, with:

Jeanne Hicks
Clerk of the Court
Yavapai County Superior Court
120 S. Cortez
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COPIES of the foregoing hand delivered this this 12th day of July, 2010, to:

The Hon. Warren R. Darrow
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